

**FILED**

**MAR 23 2010**

**SECRETARY, BOARD OF  
OIL, GAS & MINING**

**BEFORE THE BOARD OF OIL, GAS AND MINING  
DEPARTMENT OF NATURAL RESOURCES  
STATE OF UTAH**

UTAH CHAPTER OF THE SIERRA CLUB,  
et al, Petitioners,

vs.

UTAH DIVISION OF OIL, GAS & MINING  
and  
ALTON COAL DEVELOPMENT, LLC,  
Respondents.

**RESPONDENT/PERMITTEE'S  
OPPOSITION TO PETITIONERS'  
MOTION FOR LEAVE TO CONDUCT A  
SECOND SITE VISIT**

Docket No. 2009-005

Cause No. C/025/0005

Alton Coal Development, LLC (“**Alton**” or “**ACD**”), the permittee of Mine Permit No. C/025/0005, through its attorneys, Snell & Wilmer L.L.P., and pursuant to Utah Administrative Code R641-104-160 (2009), hereby submits its response to the Motion for Leave to Conduct a Second Site Visit, submitted by Utah Chapter of the Sierra Club, Southern Utah Wilderness Alliance, Natural Resources Defense Council, and National Park Conservation Association (collectively, the “**Petitioners**”). For the reasons set forth herein, Alton respectfully moves the Board of Oil, Gas and Mining (“**Board**”) to deny the Motion.

**BACKGROUND**

Alton Coal Development, LLC, is the owner and permittee of the Coal Hollow Mine, a proposed surface coal mine located approximately three miles south of the Town of Alton in Kane County, Utah. The project is located in Upper Sink Valley approximately 10 miles from the extreme southwest corner of Bryce Canyon National Park. The permit area comprises approximately 636 acres in sections 19, 20, 29 and 30, T39S, R5W, SLM. No publicly-owned

surface or mineral property is involved in the project. The entire surface is privately-owned, and all of the minerals are leased by Alton from private owners.

On or about November 25, 2009, the Petitioners filed its original request that Alton permit Petitioners' representatives to enter onto the permit area (the "**Original Request**"). The issue was fully briefed by the parties, with Alton submitting an opposition to Petitioners' original motion on December 1, 2009,<sup>1</sup> and Petitioners submitting its reply on December 3, 2009. However, before the Board made a decision on the Original Request, it was withdrawn by Petitioners on the grounds that the site was inaccessible. The parties subsequently agreed to a stipulated discovery plan (the "**Stipulated Discovery Plan**"), in which Alton agreed to allow the Petitioners access to the permit area for a site visit to take place between February 16 and March 5, 2010, for any four weekdays designated by the Petitioners. (Stipulated Discovery Plan at 1.)

In accordance with the terms of the Stipulated Discovery Plan, Alton provided the Petitioners with access to the permit area. The Petitioners requested and were granted access to the permit area on March 2, 2010, in accordance with the Stipulated Discovery Plan. Despite having an additional three days of access under the terms of the Stipulated Discovery Plan, Petitioners elected to abandon its inspection activities after one day. (Mem. at 3.) The Petitioners admit that County Road 136 was clear, but complain that the roads taking off of the County road were covered in snow. The Petitioners have now requested a second site visit.

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<sup>1</sup> Alton hereby incorporates into this opposition the arguments it has already briefed for the Board in its December 1, 2009 opposition memorandum.

In their latest request, the Petitioners do not now contend that Alton prevented the Petitioners from inspecting the site or that Alton violated the terms of the Stipulated Discovery Plan in any respect. Instead, the Petitioners argue that due to snow encountered on the site, that they are “entitled” to a second site visit.

## ARGUMENT

### I. THE REQUEST FOR AN ORDER PERMITTING ENTRY ON THE PERMIT AREA SHOULD BE DENIED BECAUSE IT IS UNTIMELY AND WILL RESULT IN UNDUE DELAY TO ALTON

The Petitioners’ request for a second site visit should be denied because it is untimely and will result in undue delay to Alton. The Petitioners have already extended this matter far longer than the time period contemplated under Utah law, which outlines a process lasting approximately 90 days or less.<sup>2</sup>

Petitioners’ latest request for another site visit—made roughly five months after Alton’s permit was granted and four months following the Petitioners’ request for agency action—is simply another attempt to delay Alton’s operations at the site. Alton reiterates its belief, expressed earlier in this matter, that if the Petitioners are without sufficient information to explain their reasons for seeking denial of the permit, even after participating in the permit review process, after seeking and obtaining an informal conference before the Division Director, and having a period of four days to inspect the site (but only using one day), then the correct action is not to delay, but to dismiss the Request for Review and affirm the Division’s decision.

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<sup>2</sup> Under the Utah Coal Mining and Reclamation Act (“the Coal Act”), a party challenges a coal mine permitting decision by requesting a hearing “on the reasons for the final determination” within 30 days of the Division’s decision. Utah Code § 40-10-14(3) (LexisNexis 2009). In response to such a request, this Board “shall hold a hearing” within 30 days thereafter. *Id.* The Coal Act requires the Board to issue its decision within 30 days after the hearing. *Id.*

## **II. THE REQUEST FOR AN ORDER PERMITTING ENTRY ON THE PERMIT AREA IS UNSUPPORTED BY A SHOWING OF GOOD CAUSE**

Contrary to the Petitioners' assertions, they are not "entitled" to an additional site visit. This Board's rules provide that it, in its discretion, may authorize discovery "[u]pon the motion of a party and for good cause shown . . . ." Utah Admin. Code R641-108-900 (emphasis added). The Petitioners did not demonstrate good cause in the initial briefing on its request, and after having been granted a site visit certainly cannot do so now.

The Petitioners cite to no Utah authority for their asserted proposition that they are "entitled" to a second site visit. Although Petitioners cite to Rule 34 of the Utah Rules of Civil Procedure, that rule does not govern the decision of the Board. Rather, R641-108-900 gives the Board the discretion to grant discovery in accordance with the Rules of Civil Procedure only "for good cause shown." Moreover, the Petitioners' citation to various federal court cases is also unhelpful, as each of these cases interpret or otherwise rely upon Rule 34 of the Federal Rules of Civil Procedure, which is not applicable here. Instead, the decision to grant or deny certain requests for discovery is within the Board's discretion and its own determination as to whether "good cause" exists for such request.

The Petitioners complain that good cause exists for a second site visit because they were not fully able to accomplish the "primary purposes" of their representatives' site visit, which were purportedly to:

(1) "inspect and photograph ACD's baseline hydrologic monitoring stations in order to verify location, geologic occurrence, association or lack of association with other water resources, or other information ACD reports for these monitoring stations, and (2) inspect, survey, photograph, and collect samples of surface geomorphic features pertaining to the existence of alluvial valley floors."

(Motion at p. 3.)<sup>3</sup>

Significantly, the above purposes were not specifically enumerated in the Stipulated Discovery Plan. No guarantees were made in the Stipulated Discovery Plan that the Petitioners would be able to obtain all information sought. The Stipulated Discovery Plan only guaranteed access, not any particular results. While the Stipulated Discovery Plan indicated that the Petitioners had reserved their right to request a follow up visit, it did not state that the parties agreed such a request should be granted. (Stip. Disc. Plan at p. 2.) Indeed, counsel for Alton verbally communicated to counsel for the Petitioners that any such request would be opposed. Moreover, the Petitioners have represented that they had the specific objective of taking approximately 30 soil samples in the permit area. (February 17, 2010 Email from W. Morris to D. Dragoo, attached as Exhibit A.)

Good cause is also lacking because the Petitioners have not availed themselves of opportunities already extended to conduct the discovery they continue to request. The Petitioners' actual efforts to inspect the site and collect data when extended access earlier this month appear to be lacking. Only one attorney of record for the Petitioners was in attendance, despite the Petitioners' insistence that a site visit was necessary "to enable Petitioners' counsel and consultant to develop a reasonably equivalent familiarity with the subject lands." (Nov. 25,

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<sup>3</sup> It should be noted that Petitioners' stated purposes for visiting the site seem to have evolved from the outset of its initial motion for a site visit. (See e.g., Nov. 25, 2009 Motion at ¶ 6.) Indeed, Petitioners offer different statements of purpose for the site visit within their Memorandum in support of their Motion for a second site visit:

"As stated earlier, the purposes of the site visit are (1) to develop better understanding of the written descriptions and analyses presented in the administrative record and (2) to identify any deficiencies in the administrative record that personal observation may disclose."

Memorandum at p. 11. These stated purposes are so broad as to encompass an almost unlimited range of activities and time periods. Petitioners cannot demonstrate good cause for such a broad "fishing expedition."

2009 Motion at ¶ 6.) Moreover, the photographs provided by the Petitioners suggest that while they spent ample time documenting the site conditions and the depth of snow in certain locations, actual attempts to gather data are not evident.

The Petitioners' claim that they could not undertake an inspection of the site due to weather conditions should fail. Site conditions may have rendered inspection of the site and collection of data less convenient, but not impossible. While certain roads on the site may have closed by snow, a snowmobile was present, which could have been used by the Petitioners to access points not accessible by vehicle. Further, at least some of the locations could have been reached by snowshoe.<sup>4</sup> The Petitioners offer no explanation as to why soil samples could not be collected by digging through the snow. Certainly the photographs do not demonstrate that the snow could not be cleared away.

The Petitioners' claims that no hydrological samples could be collected due to the snow should be ignored by this Board. First, the Petitioners have already represented that no water samples would be needed for their first site visit. (See Ex. A.) Second, this claim is at odds with the fact that Alton's consultant, Erik Petersen, was able to obtain samples and data under similar site conditions. See E. Petersen field notes, attached as Exhibit B. The contention of the Petitioners' consultant, that "in order to accomplish [his] objectives, it is necessary for the site to be entirely free of snow" to accomplish their objectives is contradicted by the hydrological data collected by Mr. Petersen. (Second Declaration of Elliott Lips at ¶ 8.)

The Petitioners also failed to avail themselves of opportunities to gather more

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<sup>4</sup> "Petitioners' representatives intend to drive or hike to and across the areas to be inspected and to obtain samples of water, soil, or other earth materials..." (February 16, 2010 Petitioners' Revised Request (emphasis added).)

information about the site during the course of the permitting process. The Petitioners did not request a site visit during the permit review process. The Petitioners' consultant submitted a list of concerns similar to the instant Request as part of the Southern Utah Wilderness Alliance's Request for an Informal Conference, filed on May 22, 2008. The Division Director, John Baza, convened an informal conference pursuant to that request in the Town of Alton on June 16, 2008. The Petitioners' representatives did not attend, nor did they seek access to the site at that time. The Petitioners did not even attempt to visit the public areas of the permit area for general observation. The Director closed the record of the informal conference on June 20, 2008.

Even without a grant of access from Alton, the Petitioners could have undertaken a significant amount of inspection of the site from public property. The permit area is not large, about 640 acres, is located in open terrain traversed by public roads, and is bordered by public land. These attributes provided ample opportunity for members of the public, including the Petitioners, to obtain "familiarity" sufficient to present evidence or offer testimony during the entirety of the permit process.

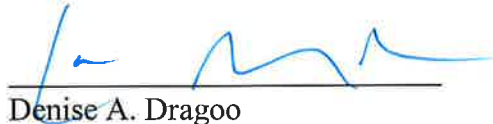
Finally, good cause does not exist here because the Petitioners cannot demonstrate the relevance of the data they seek to obtain from whatever samples they seek to take. Any additional information collected by the Petitioners would not bear upon the data that was considered by the Board in granting the permit, which data was obtained and provided through the course of the permit application process. Moreover, a sampling of one day's data is virtually meaningless when viewed against the years of data compiled in connection with the permit application.

## CONCLUSION AND REQUESTED RELIEF

For the reasons set forth above, the Petitioners are not “entitled” to a second visit to the permit area, and the Board should reject the Petitioners’ request because another site visit would result in undue delay, and is not supported by a showing of good cause. Accordingly, Alton Coal Development respectfully requests that the Petitioners’ Motions for Leave to Conduct a Second Site Visit be denied.

Respectfully submitted this 23rd day of March, 2010.

SNELL & WILMER L.L.P.



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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing  
**RESPONDENT/PERMITTEE'S OPPOSITION TO PETITIONERS' MOTION FOR  
LEAVE TO CONDUCT A SECOND SITE VISIT** was sent via U.S. Mail, postage prepaid,  
this 23rd day of March, 2010, to the following:

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A handwritten signature in blue ink, appearing to read "Donald A. Marshall", is written over a horizontal line.

# **EXHIBIT A**

-----Original Message-----

From: Walton Morris [mailto:wmorris@charlottesville.net]

Sent: Wednesday, February 17, 2010 5:39 PM

To: Dragoo, Denise

Subject: Site visit/samples resend

Denise:

Elliott Lips advises as follows:

"I may take as many as 30 soil samples. I will bring a sample splitter into the field with me. I will be collecting my samples in either quart or gallon-size plastic Ziploc bags.

I do not anticipate collecting water samples. "

Let me know if there are further questions.

Walt Morris

# **EXHIBIT B**

Sw-10.

30 Dec 08

15:10

DP4 —

2+ ft snow

OK

Sw-9

30 Dec 08

15:15

DP4 —

2+ ft. snow

OK

Sw-4

30 Dec 08

15:30

$T = 8.4^{\circ}\text{C}$

OK

pH = 7.60 7.54 7.53

Cond = 911  $\mu\text{S}$

OK

$Q = \frac{1}{2}$  gallon in 42.1 seconds

Sw-33

30 Dec 08

16:00

$T = 8.9^{\circ}\text{C}$

pH = 7.85

3.83

Cond = 1205  $\mu\text{S}$

OK

$Q = 1.25$  gallons in 19.6 seconds

30 Dec 08  
16:30

No ~~ES~~ L5-15 W.L. = 7.94' 70c  
 ES L5-28 W.L. = 7.91' 70c  
 ES L5-60 W.L. = 5.67' 70c  
 ES L5-85 W.L. = + 1.35' 70c

on 12/31/08

L5-28 30 Dec 08  
 T = 10.4°C 16:45

PH = 7.51  
 Cond = 1427  
 W.L. = 7.91' (70c)

Boiled ~ 20 minutes - drew very down

L5-85 30 Dec 08  
 16:50

T = 10.4°C  
 PH = 7.49 ~ 10mb  
 Cond = 7.37 7.35 ~ PH  
 W.L. =

well slowly free flowing

SP-6

30 Dec 08  
 17:00

T = 6.4°C  
 PH = 7.54 7.48 ES  
 Cond = 82.5 uS

Q = seepage < 1 gpm -  
 no outflow

lot of snow 2-3 feet

SW-6

ES 30 Dec 08  
 17:10

DRY

17:15

SW-36 30 Dec 08  
 opposite island 17:35  
 on pond W.L. = 54.21 ES

Full 4 ft. stackup

SW-101 30 Dec 08

snow covered dry ES 17:50

Also dry

10 Dec 08 16:00 ES

31 Dec 08

9:30

Y-63

14.42 TDC

ED

LS-85

31 30 Dec 08  
9:45

+1.35' TDC

ED

31 Dec 08

Y-59

10:45

ED

W.L. = 7.4 psi shut-in

Sorensen Spnrg

31 Dec 08  
10:55

T = 8.2°C

pH = 7.40 7.33 7.28

Cond = 686

ED

Q = 190 ml in 11.3 seconds

hard measurement - lot of snow

around spring - looks like it's been

dry out - around covered so

sampled from dry pool

Q: 27

31 Dec 08

11:15

Y-61

T = 9.7°C

pH = 7.23

Cond = 679  $\mu$ S

W.L. = 4.4 psi

ED

note - well running at

1.25 gallons in 7.75 seconds for

water when I arrived.

CS-130

31 Dec 08

11:45

T = 9.5°C

pH = 7.40 7.35

Cond = 742  $\mu$ S

W.L. = 9.5 psi

ED

31 Dec 08

12:45

SS-75 W.L. = 15.09' TDC

SS-15 W.L. = 5.66' TDC

SS-30 W.L. = 5-0.60 = 4.40'

T = 11.0°C

pH = 7.47

Cond = 1324

ED

purged a bit at 10-15 minutes



SP-8

31 Dec 08  
14:00

T = 7.6°C

PH = 7.48 7.37

Cond = 683  $\mu$ S4.95  
gpm

Q = 3.0 gallons in 22.5

3.0 gallons in 22.65 seconds

Flow is down - increased at house  
only - spray area under west 2' of  
snow cover. Valve is wide open  
and I can't see water going  
anywhere else. This flow goes to  
pond as usual.

14:20

C4-50

H = 0.46'

C4-50 W.L. = 5' - 0.46' = 4.54

C4-15 W.L. = 5.04'

C4-30 W.L. = 5.01'

31 Dec 08 14:50

C9-15

W.L. = 11.63' North

C9-25

W.L. = 11.27' middle

C9-40

W.L. = 11.88' south  
(on ceiling)

C7-20

W.L. = 10.58' west  
sounded 15-18 31 Dec 08 15:15

C7-

W.L. = 11.28'

Big stickup sounded  $\approx$  101 NO

Didn't measure 1 1/2' out on EWL

31 Dec 08 15:25

C0-54 W.L. = 23.78

Couldn't find other C0-18 well

Bored in 2nd zone



Topic shale ridge now all under  
heavy snow cover - Seeps  
on ridge under snow - no head  
of G.W. melting apparent.